

1952

State of Utah et al v. Cooperative Security
Corporation of Church of Jesus Christ of L.D.S. et
al : Respondents' Motion and Brief for Rehearing

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

State of Utah

FILED

OCT 25 1952

STATE OF UTAH by and through
its Road Commission, D. H. Whitten-
burg, Chairman, H. J. Corleissen and
Layton Maxfield, Members of the
State Road Commission,

Plaintiff and Appellant,

vs.

COOPERATIVE SECURITY COR-
PORATION OF CHURCH OF JES-
US CHRIST OF LATTER-DAY
SAINTS, a non-profit corporation of
the State of Utah, and Wasatch Stake
of Church of Jesus Christ of Latter-
day Saints, R. Clay Cummings, Trus-
tee, and President of Wasatch Stake,
a corporation sole of the State of
Utah,

Defendants and Respondents.

Clerk, Supreme Court, Utah

No. 7797

**RESPONDENTS' MOTION AND BRIEF
FOR REHEARING**

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189 P (2d) 113	

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Defendants and Respondents.

**RESPONDENTS' MOTION AND BRIEF
FOR REHEARING**

Defendants and Respondents have moved and do
now move the Court for a rehearing of the appeal in this
cause, and in support of the motion beg leave to submit
the following:

STATEMENT

The persons participating in this litigation, on both sides—the sue-er and the sued—are acting solely in representative capacity and without personal interest, and the immediate effect of the decision, however it may be ruled ultimately, will not seriously disturb the economic balance of either litigant. The State of Utah, aided by the Nation, and the Welfare Unit of Wasatch Stake, aided by the Church, will both survive the blow, which ever way the weight may fall. And Justice, long calloused by blows of violence, may likewise survive, and the new violation be patched by the graft of a “clarifying opinion,” when the case of a poor farmer who has been bruised by the trap set for the unwary by the rule of this opinion and the concurring addendum,—“there must be proof *that there are not* available comparable land which could be purchased by the condemnee”—comes before the Court on a future appeal.

But the verities of the law, I respectfully submit, do invite a re-consideration of the decision of the Court as announced, and a consideration of the record as made upon the trial of the case before the Trial Judge who heard the facts, sitting without a jury.

FIRST: The “Facts” of the case are mis-stated in the opinion and the case is ruled in direct conflict with the facts found by the trial judge upon both points in issue upon the appeal.

SECOND: The new rule of procedure in condemnation cases—made applicable to farmers only—put forth by the decision, is unjust to the condemnee, and impractical in application and unwarranted in law, mis-

takenly assumes that disturbance of economic balance is the sole cause of damage to the improvements, in the instant case.

THE FACTS

(1) THE FARM WAS A SINGLE PARCEL, DEVOTED TO A UNITY OF USE.

The opinion of the court handed down on appeal states:

“The land acquired for this project consisted of *two tracts (italics ours)* one to the north and west of Highway 40, on which all the improvements constructed for the enterprise were placed, and another tract on the other side of this highway which was used for pasturage. It is part of the latter tract which the State condemned for the new highway.”

This language is lifted from the Attorney General's brief upon the appeal. It is not a true statement. It is not the record in the case. It is not in accordance with the proof offered by the State itself and received in evidence and used without question as the basis of the trial by both parties and by the Court. For the writer of the opinion of the Court to carry this language and mis-statement of fact—the very first and basic fact in the case—into the opinion of this Court, invites surmise that perhaps the brief of respondents, as well as the transcript of the proceedings of the trial and the exhibits, had not come to the notice of the Court.

In our brief upon the appeal we challenged the assertion of the Attorney General's Brief, and said:

“We were surprised and astounded, therefore, to

find in the statement of facts in appellant's brief as the very basis of this appeal and running throughout the brief, both in the statement of facts and in the list of points, that the 7.89 acres taken by the plaintiff was a portion of a larger tract of pasturage, containing, before the taking, 131.79 acres, and that these 131.79 acres did not include the land north of Highway 40."

We went to the bother and expense of printing five pages (Pages 2 through 6) in our brief on appeal of statement and quotation from the record to correct the mis-statement of the record found in the Attorney General's brief. We especially invited this Court to look at the map, Exhibit "A"—the State's own exhibit—(not the map attached to the complaint). Did all this pass the notice of all five members of this Honorable Court?

The Church owned a total of 131.79 acres. The map was identified by Vernon Bridge (Ts. 3), chief right of way design engineer of the State Road Commission. He said;

"The portion of the map shown outlined in red ink lines represents the property of the Cooperative Securities Corporation before the taking by this condemnation, containing a total acreage of 131.79 acres."

The map had this in crayon, put on by the engineer:

"Cooperative Security Corporation

"Total acreage, 131.79 AC

"Remaining, 123.90 AC"

The red line thus pointed out upon the map by the State's first and only witness upon direct, runs around

the entire Church property — an unbroken line—and around the portion of the property of defendant lying on the north side of U. S. Highway 40, and crosses the said highway twice.

But, if this Honorable Court was not impressed by defendant's brief upon the appeal, and did not so much as look at the map to verify the statements so erroneous contained in the Attorney General's brief, how may we hope to impress the Court now, to at least read the record, if not our brief; and what basis may there be for a hope that a repetition of the recital of facts might provoke at least a consideration of the case upon the record made at the trial and not let it stand ruled upon false premise?

We are not unmindful of the great pressure from the mass of appeals taken, under which this Honorable Court labors, and of necessity there must be delegation of the task of research and verification; and the statistics upon the results in instances of motions for rehearings have heretofore discouraged us from attempting to secure a review by the Court of a decision once announced, and especially when there has been unanimous concurrence in the result. In fact, as I recall, this is my first motion for a rehearing of a decision of this Court once announced, in thirty-five years of winning and losing appeals to this Court, as the dice have fallen, the statistics of which I have not attempted to keep.

And we have marked the annoyance which naturally arises when it is suggested that the labors of counsel for the loser have been lost by reason of the failure of the Court to "read the record."

Hence, if the slur of the record implicit in the treatment of the case in the decision did not come about from some such circumstance as we have suggested, but was considered, we apologize, in advance of rebuke, for the reference!

(2) THERE WAS NO LAND AVAILABLE,
COMPARABLE TO THE LAND TAKEN.

The testimony of witnesses so said, and the trial judge so held!

Notwithstanding which, this Honorable Court, in the opinion handed down says:

“* * * *there was evidence* that at the time the summons was served * * * there was available a tract of pasture land adjacent to respondents' property on the east and only separated from it by a fence. *This tract was comparable to the land taken* for the use to which it had been put.”

From whence comes this dictum?

We do not find the expression in the brief of Appellant, even! The strongest language of that brief is, “The defendants simply were *not* (italics appellant's) restricted in *available* (italics ours) pasture acreage by this action.” Page 10 of Appellant's brief. And again, “In this case, there is no question but that *additional land was available* (italics ours) to the defendants.”

The Trial Judge did not find the fact to be that there was comparable land available; his decision and findings allowing severance damage measured by the yard stick of market value was directly to the contrary!

What was the testimony?

The very first witness called by the defendants, Mr. Cummings, said: (Tr. 74)

“We were hopeful we could get some ground *comparable* to what we were losing, and would still rather have it than what we sued for. Rather have the ground replaced.”

And specifically of the *Berg* land which was offered for sale by the procurement of the Highway Commission, the witness testified:

“Q. And that property which he offered to sell to you was his field immediately east of your property, wasn't it?

“A. Part of that field. We weren't satisfied with what he was willing to sell us because it was, the ground, wasn't as good as what we were losing. Not nearly as good. Not half as good. * * * He offered to sell it for \$400.00 an acre.”

The witness further testified that there was a small tract owned by Mr. Berg which was on the north side of the small sliver of land of the defendants lying north of the new highway, and that the defendants had been negotiating to buy that land, but that Mr. Berg would not sell it, and that he would not sell it for around \$600.00 an acre, “I doubt if he would take \$600.00 an acre for it.”

And the witness was asked the following question and gave the following answer:

“Q. Do you know of any ground adjacent to you in that area, that is comparable to your ground, that you can acquire at any price similar to what you have stated it was worth before this taking?

“A. No. We have indicated to some of those people we would pay them considerably more for ground than we had claimed as a value of ours, and they just ignore us. They won’t sell at the price we have indicated.” (Tr. 68)

Lyman Holmes Rich, (Extension Dairymen for the Utah State Agricultural College), called by defendant, gave the following testimony:

“Q. You mentioned the effect of driving heavy cows, that is heavy producing cows, distances. Are you familiar with the property that is to the extreme east of this property?

“A. Yes, I am.

“Q. Known as the Berg place?

“A. I am in general. * * *

“Q. State whether or not in your opinion that is a distance that would affect materially the efficiency of the cows and their production if driven from this base property from the barn to that farm?

“A. Any distance above three-eighths of a half mile for heavy producing cows is too far to drive them. * * *”

Lowell Woodward, called by defendants, (a soil scientist with the Soil Conservation Service of the Federal Government, a B. S. degree from U. S. A. S., majoring in agronomy in soils, and some graduate work in B. Y. U. in soils) made soil tests of the Church property and of the Berg property lying east of the east line of the Church farm. (Direct, Tr. 120; Cross, Tr. 122; Re-direct, Re-Cross and Re-Direct, Tr. 125-128; and on rebuttal for

defendants, Direct, Tr. 368-370, Cross, Tr. 370-372.)

On the Church property three-fourths of the holes showed that the soil was 36 inches at least, or deeper. One or two holes were over 60 inches deep. There was no water table reached at the time, and no vegetative obstructions, such as trees.

Whereas, on the Berg property, just over the fence, about twenty holes showed soil 20 to 26 inches deep, without water table over gravel. As he went east the soil became shallower. About four-tenths of the holes had soil less than 20 inches, and one-tenth had soils less than 10 inches, some places practically no soil at all. In the center, where the soil got deeper, there was water from zero to ten inches. He did not have boots on that day and so did not cover the entire tract. Where the soil was shallowest it would definitely need levelling in order to properly irrigate it, and in some places with ordinary levelling there would be no soil left in some of those spots. There was indication of rock or greval at the surface. Part of the land near the river was covered with trees and other vegetation which would have to be removed before the land could be tilled. "I very seldom map swamps."

The plaintiff called witnesses who gave testimony upon this phase of the case. The question of "comparable" lands was rather fully explored, we thought.

Noel Peterson, an up-river neighbor, very much for the new highway and the plaintiff, testified. (Tr. 278-279; 288-290; 291-292) He said the best of the Berg property is right there at the west end, including the piece north of the Church property.

“Q. In other words in order to get any comparison between this property and Berg’s you have to take this stretch that lies right in here by this little piece here, don’t you. (Indicating on Exhibit “A”)

“A. Yes. Place north.”

And he was of opinion that the two little pieces paralleling the new highway, one of 1.21 acres belonging to the Church after the taking, and the little piece owned by Berg north of the sliver, were “comparable.”

Vernon Bridge, the map man for the State, produced a map of the Berg property. (Exhibit “B”), 15.3 acres, in the brown, designated on the map as “swamp pasture land.”

Leo L. Gardner, for plaintiff, testified (Tr. 322-323) that he honestly believed that an intelligent prospective buyer would buy the Church farm just as quick as would otherwise, if “you could buy the other property belonging to Mr. Berg. (Which included the tract to the north of the Church property, and which was not offered at any price.)

William H. Lemon, for plaintiff, an up-river dairy farmer, gave testimony that the Berg land and the Church land were “practically the same. (Tr. 350-357). He said he believed there had been more hay raised on part of Berg’s property than on the Church property, but that the Church property has been in pastures so long he don’t remember where he had seen hay cut from the Church property.

“Q. Well, what you mean to say then is that

Berg in his good meadow cuts more hay than the Church does in their willows?

“A. Yes, sir.

The State also called Mr. Berg, who testified at length upon the conversations in relation to the sale of his property. He said it was in April, 1950. (Tr. 323-337). (The summons was served in February) What he offered to sell was south of the road to the river.

Asked if he knew the soil depth, comparatively, between the two areas, the Church land and his, he said “No, I don’t. He had never made any investigation to see how far down you go with your good sod even.

Upon all of this testimony, the trial court was of opinion that the Berg land which was offered through the Road Commission in place of that taken from the Church property, was not comparable with the Church property.

The *Carlson* case was called to the attention of Judge Nelson during the trial and upon the argument before the case was submitted for decision.

The defendant had pleaded expressly in the answer that there was no available land in the area, no land comparable to the Church land that could be purchased in place of that taken.

Mr. Cummings had testified that he and his associates had canvassed the area in the attempt to buy additional land, and that none was for sale; that the land lying west of the Church property was good land and comparable, and the Church had tried to buy it, but that it was not for sale at any price.

The Berg property that does compare with the Church property was not offered by Berg, at any price!

From whence then comes the dictum of this Honorable Court that the Berg land is “comparable.”

While there was no specific “finding” upon the matter of availability of replacement land, the decision of the trial judge is made upon the basis that there was no comparable land available.

No other kind can be forced upon the condemnee, surely!

The testimony of defendants’ witness, and expressed by Mr. Cummings that there were no “comparable” lands available, was borne out by comparison with the tendered land upon each element specified in the *Carlson* case and quoted by Mr. Justice Wade in the opinion here under re-consideration, and amply justified the position taken by the trial judge that defendants were entitled to *severance* damages, measured by the formula of the statute in such case made and provided and uniformly applied by this Honorable Court in every case coming before it prior to this time. (There is no suggestion in the *Carlson* case, nor in the authority cited therein, that difference in market value is not the measuring stick). The trial judge, trying the facts, found the “value of the land taken” and the “damages to the remainder by reason of the severance.”

WHAT IS THE NEXT STEP UNDER THE DECISION?

There is an additional imprecission in the opinion

handed down, I respectfully submit, in respect of the procedure to be followed by the parties and the court below, if the decision is allowed to stand without clarification, viz: Does it require or permit a new trial? And may either party, if so minded, produce additional evidence upon the question of "comparability?" Or, new or additional evidence upon the question of the "in place" value of the land taken? And, generally, just how is the trial court to proceed to "reassess the damages for the taking, on a basis of the replacement cost, as well as to assess damages, if any, to the two small tracts which were severed?" And, does the Court mean to hold that there is not a severance damage to the meadow south of the new highway? If not, upon what theory, pray?

DESTROYING THE "ECONOMIC BALANCE" IS NOT THE SOLE CAUSE OF DAMAGE

The theory of the Court in the decision handed down entirely ingores the effect upon the market value of the entire farm by reason of the construction of a new, modern speedway for automobiles through the middle of the grazing land, and creating a new junction with the existing highway connecting the lands of the Church, and in the use of which the automobile traffic will hit the old highway immediately across from the barns where the cows are kept a large part of the time, and creating an added burden and nuisance from noises, glaring lights, and smash-ups, all disturbing to the cattle, and an increased hazard from the increase in traffic. All these consequential damages are reflected in the formula of the law of this State, which fixes the measure

of compensation in all kinds of condemnation cases, farms, churches, industries, and what not, by the same rule and yard stick, viz: The value of the land taken, and the damage to the remainder by reason of the severance, measured in dollars and cents, not in land! or other commodity! And in the application of this formula it is always proper for the trier of the facts to consider the use to which the land taken is to be put and the foreseeable effect such use, whether railroad, highway, or industry, and the very location upon the land of the condemnee, will have upon the market value of the entire property of the owner.

The Court's opinion handed down in this case would deprive the owner of all this "tested and found true" rule, which is the rule fixed by the legislature and followed by this Honorable Court in every decision—not excluding the *Carlson* case—down to this one.

The dictum of Mr. Justice Wolfe, in his concurring opinion, would limit the recovery to such sum as "would restore the economic balance of the farm." The disturbance of the economic balance of the owner's property, farm, or what not, is not the sole element of damage to the improvements upon the land, whether farm, or other industry, caused by the construction of the improvement and the manner and place of its location.

In this connection the attention of the Court, and particularly Mr. Justice Wolfe, is respectively invited to the opinion of the Court and the concurring opinion of Mr. Justice Wolfe in

State et al v. Ward et al.

189 P (2d) 113

There the owner wanted *replacement* value!

The Court unanimously and with a special concurring opinion, stuck to the formula of the law, "market value" before and after.

* * * * *

Respondents respectively pray the Court to recall the opinion handed down, and render judgment affirming the decision and judgment of the Court who tried and ruled, after hearing the testimony of the witnesses and personally viewing the premises, and considering the arguments of counsel, in accordance with law made in such cases, and justly between the parties.

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the pending Motion for
Rehearing.

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